

NOV 10 2003United States v. Serrano; 01-50436

THOMAS, Circuit Judge, dissenting

CATHY A. CATTERSON**U.S. COURT OF APPEALS**

I agree with the majority's thorough and excellent legal analysis of the trial court's duty to inquire into a potential conflict of interest when it knows or reasonably should know that a particular conflict of interest exists. I also agree with the majority that even if the district court failed to properly inquire into counsel's conflict of interest in this case, automatic reversal is not required.

However, under the specific facts of this case, I cannot fault the district court's discharge of its duty of inquiry. In response to Serrano's initial letters alleging that counsel had "abandoned" him and asking for appointment of new counsel, the district court questioned Merryman at the April 2, 2001, hearing, appointed new counsel, and postponed sentencing. After receiving Serrano's letter alleging that Merryman, now no longer Serrano's counsel, had improperly represented a co-defendant at the time Serrano's plea was entered, the district court granted a continuance at the request of Serrano's new counsel, Mr. Perez, in order to permit counsel to address the alleged conflict of interest. At the final sentencing hearing on July 9, 2001 the district court began by noting that "the matter has been continued for reasons which the parties are aware," referring to the conflict of interest investigation undertaken by counsel at the previous hearing.

The court then asked to hear from defense counsel, and asked if there were any legal cause why sentence should not be pronounced. Defense counsel replied that there was not. Accordingly, the district court then imposed a sentence of 121 months, just one month more than the statutory mandatory minimum and 30 months less than the lowest downward departure requested by the government.

Although the trial court has a duty of inquiry when it knows or reasonably should know that a particular conflict exists, “trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel” to determine whether a conflict exists and whether it will hinder the representation. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980). Given that Cuyler approves a trial court’s reliance on defense counsel’s inquiry into his or her own potential conflict of interest, the court’s reliance in this case on new counsel’s investigation was not unreasonable; Perez asserted that he would investigate the conflict issue raised by Serrano’s letter and later assured the court that there were no further problems or legal impediments to sentencing.

Further, when the district court has a duty to inquire into a potential conflict of interest, it must “either appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.” Campbell v. Rice, 302 F.3d 892, 897 (9th Cir. 2002) (quoting Holloway v. Arkansas, 435

U.S. 475, 484 (1978)). Therefore, the remedy for an alleged conflict of interest is the appointment of new counsel. Here, the district court inquired into Serrano's reasons for requesting new counsel when Serrano first mentioned a "conflict of interest" in his initial letter, and had already appointed new counsel when the alleged multiple representation was brought to its attention. Thus, even if the district court's duty of inquiry could not be discharged by delegating the investigation to counsel, Serrano had already received the remedy for any alleged conflict. Accordingly, I would affirm the sentence imposed by the district court.